UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FIRSTLINE TRANSPORTATION SECURITY, INC.,	)	
	)	
Employer,	)	
	)	
and	)	**CASE NO.**
	)	**17-RC-12354**
INTERNATIONAL UNION, SECURITY, POLICE, AND FIRE PROFESSIONALS OF AMERICA (SPFPA),	)	
	)	
Petitioner.	)	
	)	

BRIEF OF *AMICUS CURIAE*
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
IN SUPPORT OF PETITIONER

Now comes *amicus curiae*, the American Federation of Government Employees, AFL-CIO (AFGE), in support of Petitioner, International Union, Security, Police, and Fire Professionals of America (SPFPA). AFGE urges the Board to uphold the Decision and Direction of Election issued on May 27, 2005 (Decision) by D. Michael McConnell, Regional Director, Region 17. The Decision correctly interpreted the Aviation and Transportation Security Act (ATSA), which does not bar the Board from asserting jurisdiction in the instant case. Furthermore, the Board should assert jurisdiction over private screeners in the name of national security. First, it is an insult to the organized police officers and firefighters who died in response to the attacks of September 11, 2001, to suggest that organizing and collective bargaining impedes national security. Second, organizing and collective bargaining will provide private screeners the workplace protections needed to allow security screeners to focus on their national security mission.

I. THE BOARD HAS JURISDICTION OVER PRIVATELY EMPLOYED AIRPORT SECURITY SCREENERS.

A. THE AVIATION AND TRANSPORTATION ACT DOES NOT BAR BOARD JURISDICTION.

1. The Explicit Language of the Aviation and Transportation Act does not preclude Board Jurisdiction.

On November 19, 2001, Congress passed the ATSA, primarily for the purpose of federalizing airport screeners. The ATSA provided for a pilot program in which five airports maintained a private screening work force. The issue in the instant case is whether the Board has jurisdiction over private screeners (of one of these five airports) who wish to organize and hold an election pursuant to the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* (NLRA). The ATSA is not a statutory bar to such an election.

The starting point of statutory interpretation must be the language and structure of the statute itself. *TNS, Inc. and Oil, Chemical and Atomic Workers International Union, AFL-CIO,* 309 NLRB 1348, 1448 (1992)(a cardinal rule of statutory construction requires that "the starting point for interpreting a statute is the language of the statute itself."); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 593 (2004) (looking to text, structure, purpose, and history of Act to find it unambiguous); *Pilon v. U.S. Dept. of Justice,* 73 F.3d 1111, 1118 (D.C. Cir. 1996); *NY State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co,* 514 U.S. 645 (1995); *U.S. National Bank of Oregon v. Independent Insurance Agents*, 508 U.S. 439, 455 (1993)("statutory construction...must account for a statute's full text, language as well as punctuation, structure, and subject matter."); *Schreiber v. Burlington Northern, Inc.,* 472 U.S. 1, 5 (1985); *Lewis v. U.S.*, 445

U.S. 55, 60 (1980). Specifically, the reviewing adjudicator must first look to whether Congress has "directly spoken to" the issue. *See Association of American Railroads v. Surface Transportation Board*, 162 F.3d 101, 104 (D.C. Cir. 1998). If so, that ends the matter, because the reviewer's "first duty. . .in resolving any issue of statutory construction is to give effect to the will of Congress." *Negonsott v. Samuels*, 507 U.S. 99, 104 (1993).

Here, the text and structure of the ATSA clearly reflect that Congress did not bar security screeners employed by (approved) private companies from organizing for the purposes of an election.[1] The Regional Director was correct when he found "no language in the ATSA that would purport to remove private employees, even those performing security screening duties, from the protections of the NLRA." Decision at 7. In fact, other than restrict screeners from striking, the language of the ATSA is silent as to whether private security screeners may organize and/or have rights pursuant to the NLRA.

[1] AFGE asserts that the statutory language of ATSA does not bar either federal or private screeners from organizing. With regard to federal screeners, AFGE suggests that the statutory language found at 49 USC §114 (n), requiring the Administrator to create a management system akin to the Federal Aviation Administration's personnel system (whose employees are permitted to organize and hold elections for union representation), permits federal screeners to organize and hold elections for union representation. AFGE further suggests that the statutory note, 49 USC §44935 (note), which grants the Administrator discretion with regard to screening personnel, is authoritative in interpreting the meaning of the code but not part of the code itself. Thus, as a note it does not have the force to override the grant to federal screeners organize and hold elections found in Section 114 (n). Lastly, AFGE suggests ATSA's prohibition against a strike by screeners is superfluous if the code did not permit organizing by screeners. See 49 U.S.C.A. § 44935(i).

a. Congress was aware when it enacted the ATSA of the existence of the NLRA. Congressional silence regarding the right of private screeners to organize, therefore, should be interpreted to permit the NLRA to apply to the private screeners.

In ATSA, Congress neither expressly permits nor forbids private screeners from organizing pursuant to the NLRA. The ATSA speaks to aviation screening in multiple sections; in none of these sections is the NLRA mentioned. This silence in the text plainly allows screeners employed by private companies to organize. Additionally, this silence does not render the statute ambiguous. *N.L.R.B. v. Pueblo of San Juan,* 276 F.3d 1186, 1209 (10th Cir. 2002)(dissent)(silence does not render a statute ambiguous); *U.S. v. Craveiro*, 907 F.2d 260, 262 (1st Cir. 1990)("Congress's silence does not render the statute ambiguous."); *Albernaz v. U.S.,* 450 U.S. 333, 341 (1981)(ambiguity should not be assumed from legislative silence). Instead, the silence and lack of ambiguity in the statutory text dictates that the proper interpretation of ATSA is that the private screeners' right to organize remains intact. To hold otherwise would eviscerate the general application of the NLRA to groups of employees whose employment is (partially) regulated by another statute.

Had Congress wanted to eviscerate private screeners' rights to organize, it would have manifested its intent with language to that effect. In general it is assumed that Congress legislates with knowledge of already existing laws. *Brock v. Writers Guild of America, West, Inc.*, 762 F.2d 1349, 1358 (9th Cir. 1985)(fn 8); *Albernaz, supra,* at 341-342 (because Congress is composed predominately of lawyers, it may be assumed that Congress is aware of existing law). Applying the reasoning in *Brock* and *Albernaz* to the

instant case, Congress was presumably aware when it enacted the ATSA that the NLRA would govern the private screeners' right to organize. Congress' failure to make any express provision in the ATSA to eliminate screener's right to organize indicates Congress's intent to authorize private screeners to organize. If anything can be presumed from Congress's silence, it is that Congress legislated with the NLRA in mind and chose to preserve organizing rights.

b. That Congress restricted all screeners' right to strike shows that had Congress wanted to further restrict private screeners' right to organize, it could have.

Congress manifested its intent to allow private screeners to organize when it expressly limited their right to strike. See 49 U.S.C.A. § 44935(i)("An individual that screens passengers or property, or both, at an airport under this section may not participate in a strike, or assert the right to strike, against the person (including a governmental entity) employing such individual to perform such screening."). Congress was aware of the plethora of organizing activities and only chose to limit one aspect, thus leaving all others in place. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980). In the instant case, Congress explicitly enumerated one exception to a general right to organize, and additional exceptions are not to be implied. The only limitation that Congress made to the right to organize was the right to strike. Other than the right to strike, private screeners have the right to organize pursuant to the NLRA.

Had Congress intended to preclude screeners from organizing, then prohibiting them from striking would be redundant, and at best, superfluous. The Board should not interpret ATSA to render any section meaningless. Rather, in construing the meaning of the ATSA, the Board itself has recognized that "'significance and effect shall, if possible, be accorded to every word' of the disputed provision." *TNS, supra.*, at 1448 (quoting *Market Co. v. Hoffman*, 101 U.S. 112, 115-116 (1879)). *See also Tobey v. NLRB*, 40 F.3d 469, 471 (D.C. Cir. 1994) ("fundamental principle of statutory construction mandat[ing] that [statutes be read] so as to render all of their provisions meaningful."); and *United Food and Commercial Workers v. Brown Group,* 517 U.S. 544, 550 (1996)("The more natural reading of the statute's text, which would give effect to all of its provisions, always prevails over a mere suggestion to disregard or ignore duly enacted law. . . ."). As applied to this case, there would have been no meaningful reason to prohibit a strike if the private screeners were prohibited from all aspects of organizing. The Board should not render this section meaningless by declining jurisdiction.

c. ATSA does not pre-empt the NLRA by implication.

The Board should not find that there is an *implied* preemption of private screeners' organizing rights. Repeals by implication are not favored. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 189 (1978). Congressional silence does not create an *implied* preemption of private screeners' organizing rights. Similarly, Section 44935 (note)[2] pertains to federal security screeners only and should not create a repeal by

[2] The Federal Labor Relations Authority (FLRA) held that Section 44935(note) precludes FLRA jurisdiction over federal transportation security screeners. See TSA and AFGE, 59 FLRA 423 (2003).

implication over Board jurisdiction in the instant case. ATSA does not create an implied preemption of the NLRA and therefore, the Board has jurisdiction.

d. The private screeners are not members of the federal service.

Firstline argued below that the TSA's decision to deny collective bargaining and the right to exclusive representation for security screeners in "federal service" applies to the private screener workforce. The Regional Director correctly disagreed. Decision at 7. The language of ATSA and an unbroken line of case interpretation squarely indicate that screeners who are employed by a private screening company are not members of the federal service. Therefore, TSA's decision with respect to security screeners in federal service is inapplicable to the private screening workforce.

ATSA clearly identifies that there are screeners who are part of the federal service and screeners who are not. At 49 USC §114 (e), the Administrator[3] is given responsibility "for day to day *Federal* security screening operations for passenger air transportation and intrastate air transportation." *Id.* (emphasis added). At Section §114 (n), "[t]he personnel management system established by the Administrator of the Federal Aviation Administration under section 40122 shall apply to the *employees of the Transportation Security Administration* ...." *Id.* (emphasis added). In 49 USC 44919, the Administrator is required to establish a pilot program whereupon the screening of passengers and property at an airport "will be carried out by the screening personnel of a qualified *private screening company*...." *Id.* at §44919(a)(emphasis added). While the private screening companies must be deemed "qualified" by the federal government and

[3] In the ATSA, the Administrator is referred to as the "Under Secretary."

adhere to standards, the statute clearly identifies the employer as private sector. Similarly, 49 U.S.C. 44920 clearly identifies a private employer for a subsection of screeners. Section 44920 establishes an "opt-out" program that requires the Administrator to create a permanent program for the screening of passengers and property at an airport "carried out by the screening personnel of a *qualified private screening company*...." *Id.* at §44920(a)(emphasis added). The annotation to § 44935 again designates its application only to the federal sector. In all of these sections, the language of ATSA clearly distinguishes between screeners in federal service and those employed by private companies. In contrast, 49 U.S.C.A. § 44935 uses language to encompass both federal and private sector screeners. It is clear that Congress envisioned two types of screeners, those of private companies and those employed by the federal service. Nothing in ATSA suggests that the private sector screeners should be treated as federal sector screeners unless expressly stated in the statute itself.

Since 1947, the Board has asserted jurisdiction over employers who contract to furnish supplies or render services to the federal government, even when the federal government dictates employment standards. The Board recognized that by contracting with the government the employer does not become governmental agent and/or instrumentality, and likewise, their employees are not part of the federal service. *See In the Matter of Reynolds Corporation and United Steelworkers of America*, 74 NLRB 1622 (1947)("We do not believe that an independent contractor [to the U.S. Navy Department] ceases to be the employer of those he hires, fires, compensates, and directs in their work, merely because the party who has agreed to reimburse the independent contractor's labor and material costs insists that the wage scales paid receive prior approval as a condition

to such reimbursement."); *In the Matter of American Smelting and Refining Company and International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers,* 92 NLRB 1451 (1951)("While it appears that the Employer's authority in virtually all respects is subject to the review and approval of the Federal Government, there clearly remains with the Employer an area of effective control over labor relations at the plant. We find, upon this record, that the Employer's status is that of a Government contractor and not that of an agent of the Government so as to exclude it from the coverage of the Act."); *Yosemite Park and Curry Co. and Charles Parker,* 172 NLRB 1740 (1968); *Marianas Stevedoring & Development Co., Inc. and International Union of Operating Engineers,* 182 NLRB 1043 (1970) (the Board asserted jurisdiction over contractor to the U.S. Navy to repair naval vessels at U.S. facilities in Guam, although the government exercised a great measure of control over the contractor's labor relations policies and employment conditions); and *Management Training Corporation and Teamsters, Chauffeurs, Warehousemen And Helpers Of America, Local 222,* 317 NLRB 1355 (1995)(asserting jurisdiction over an employer whose conditions of employment were highly regulated by the Department of Labor). The Board has repeatedly held that employees of a private government contractor should not be viewed as part of the federal service, and/or, federal government control over a government contractor does not render organizing and bargaining meaningless. The instant case is no different and the Board has, and should assert, jurisdiction.

e. **Alternatively, were the private screeners considered part of the federal service for the purposes of determining whether they have the right to elect a representative for the purposes of collective bargaining, the Board would still have jurisdiction. The TSA has clearly stated that they are "neutral" as to whether private screeners can organize and have not sought to restrict private screeners' right to organize, as it has the federal screeners.**

As accurately set forth by the Regional Director, the TSA has issued guidance that lays out the privatized screener workforce's right to join a union and collectively bargain with their employer. Decision at 8. Specifically, in its June 2004 Guidance on Screening Partnership Program (Guidance), the TSA states:

> Federal screeners are not entitled to engage in collective bargaining with TSA. TSA is neutral about contract employees of a private firm seeking to organize themselves for collective bargaining with that contractor.

Guidance at 8. Similarly, on the TSA web site,[4] Question 27 of the "SPP Frequently Asked Questions" states as follows:

> **27. Q: What is TSA's policy regarding private screeners joining unions?**
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> A: It is TSA policy to allow federal screeners to join any union but to not allow any union to represent all screeners for the purpose of collective bargaining. TSA does not take a position regarding whether screeners employed by private screening companies may organize themselves for the purposes of collective bargaining with their company. This is a matter between those screeners and their private employer. However, airport security screeners, private or federal, do not have the right to strike.

[4] http://www.tsa.gov/public/interapp/editorial/editorial_1752.xml

A straightforward reading of the text and structure of ATSA, as well as the TSA's policy regarding private screeners and their union rights, compels the conclusion that Congress directly spoke to the issue of TSA's labor relations program and manifestly evidenced an intent to allow private screeners within the scope of the NLRA. It further compels the conclusion that the Board has jurisdiction in the instant matter.

The Board has previously considered a federal agency's position vis-à-vis government contractor employees' right to organize when determining whether to exercise jurisdiction. In *General Electric Co. and International Union of Electrical, Radio and Machine Workers, et al..*, 89 NLRB 726, 736 (1950), the Board stated

> We have, in a number of earlier proceedings, exercised our jurisdiction under the Act to define the appropriate unit of employees in atomic energy plants operated under contract with the Atomic Energy Commission. Our decision to do so in those cases was based in part upon the unqualified assent by the Atomic Energy Commission to collective bargaining among the employees involved. That Commission has taken no contrary position on the issue before us here with respect to these employees. [FN20] As the record in this case reveals no pertinent facts relative to the nature of the work performed in the Employer's atomic energy operations, or concerning any aspects of national security, which were not before us in prior proceedings of this nature, we perceive no reason for adopting a different policy here.

As applied herein, the Board may base its assertion of jurisdiction, in part, on TSA's assent, or at the very least unqualified neutrality, to collective bargaining between the private screeners and their employer. Thus, the Board has jurisdiction in the instant case.

B. THE HOMELAND SECURITY ACT DOES NOT BAR BOARD JURISDICTION.

On November 25, 2002, Congress enacted the Homeland Security Act of 2002, Pub.L. 107-296 (HSA), creating a new cabinet-level department in the executive branch charged with the performance of an amalgam of functions that had, up to then, been carried out by twenty-two other agencies, including TSA. Pub. L. 107-296. The actual transfer of TSA functions into the Department's Directorate of Border and Transportation Security occurred on March 1, 2003.

In enacting the HSA, Congress gave the Secretary of DHS authority to establish a human resources management system for the department, but mandated that any such personnel system shall "ensure that employees may organize, bargain collectively and participate through labor organizations of their own choosing in decisions, which affect them." Pub.L. 107-296, §841(a)(2)(amending Title 5, United States Code by adding chapter 97). As applied to the instant case, were the Board to find that the private screeners should be treated as federal service, the HSA mandates that these employees may organize. Therefore, the Board has jurisdiction in the instant case.

C. THE BOARD HAS JURISDICTION PURSUANT TO ITS OWN REGULATIONS.

The Board has jurisdiction to hear this case pursuant to the NLRA and its interpretive case law. The NLRA permits the Board to exercise jurisdiction over private employers who engage in commerce. 29 U.S.C. § 152. In the past, the Board considered additional factors in asserting jurisdiction, such as employer control over government

contractors. *See Res-Care, Inc. and Indiana Joint Board, Retail, Wholesale and Department Store Union*, 280 NLRB 670 (1986). However, in *Management Training Corporation and Teamsters, Chauffeurs, Warehousemen And Helpers Of America, Local 222*, 317 NLRB 1355 (1995), the Board eliminated the additional factor of employer control and limited jurisdictional review of government contractors to "whether the employer meets the definition of "employer" under Section 2(2) of the Act, and whether such employer meets the applicable monetary jurisdictional standards." *Id.* at 1358 (footnote omitted).

Applying the *Management Training Corp.* standard to the instant case, the Employer in the instant case meets the definition of "employer" under Section 2(2) of the Act, and meets the applicable monetary jurisdictional standards in that in the course and conduct of its business operation, it purchased, received goods and services, or both in excess of $50,000 directly from sources located outside of the state in which it is located. Decision at 2. In fact, even the Employer concedes that it meets the NLRA's statutory jurisdictional standards and the Board's current discretionary standard. Decision at 2. Therefore, the Board has jurisdiction in the instant case.

II. THE BOARD SHOULD EXERCISE JURISDICTION OVER PRIVATELY EMPLOYED AIRPORT SECURITY SCREENERS.

Since the enactment of the NLRA in 1935, the Board has consistently expanded its assertion of jurisdiction. For the first 15 years the Board exercised its discretion on a case-by-case basis. See An Outline of Law and Procedure in Representation Cases at 1-100(a). Thereafter, the Board implemented a policy delineating categories of enterprises

in which it would assert jurisdiction. In response to the U.S. Supreme Court's decision in *P. S. Guss d/b/a Photo Sound Products v. Utah Labor Relations Board,* 353 U.S. 1 (1957), the Board revised its jurisdictional policies so that more individuals, labor organizations, and employers could invoke the rights and protections afforded by the statute. In *Siemons Mailing Service and San Fransisco-Oakland Mailers Union, et al.,* 122 NLRB 81, 82 (1958), quoting and citing to *Guss*, the Board expanded its jurisdictional reach to the full limits created by the NLRA stating:

> The Board believes that, in the present circumstances, its primary function is to extend the national labor policies embodied in the Act as close to the legal limits of its jurisdiction established by Congress as its resources permit [in order to avoid 'a vast no-man's-land subject to regulation by no agency or court.']."

With regard to government contractors, the Board recently extended its jurisdiction by asserting jurisdiction over government contractors who meet the definition of "employer" pursuant to the NLRA and who meet the applicable monetary standards that establish the employer is engaged in commerce. See *Management Training Corporation, supra,* at 317.

The Board is urged to assert jurisdiction in the case at bar. Doing so is consistent with long standing precedent to assert jurisdiction. Were the Board to decline jurisdiction in the name of national security, it would be an insult to the organized men and women who have perished on behalf of national security, and would cause a vast no man's land for individuals who are seeking to assert their First Amendment right to associate.

A. THE BOARD SHOULD ASSERT JURISDICTION IN HONOR OF THE UNION MEMBERS WHO LABORED, DIED, OR BOTH DEFENDING FREEDOM ON SEPTEMBER 11, 2001.

On September 11, 2001, the people of the United States of America awoke to tragedy as reports issued of a large, commercial passenger airplane which had crashed into the first of the World Trade Center twin towers. While most Americans were paralyzed by the reports, America's unionized emergency response professionals were mobilizing. Within four minutes of Flight 11's crash into the north tower, the first of the New York Fire Department's (NYFD) fire trucks arrived to the scene.[5] Two minutes after Flight 176's crash into the south tower, the NYFD issued its second alarm and deployed trucks to the south tower.[6] By the evening, more than 50 NYFD companies had been deployed, the NY Police Department reported that 78 officers were missing, and concerns for the fire fighters who were first to respond were mounting.[7] In total, 23 city police officers and 343 city firefighters were killed responding to the 9/11 terrorist attacks.[8] From the combined tragedies in NYC, Washington, DC, and Pennsylvania, more than 1,000 union members died.[9]

In the following days, hundreds of construction trade workers went to assist in the search for survivors.[10] So many construction workers volunteered, in fact, that a construction union hiring hall ran a full-page newspaper advertisement encouraging

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[5] FAA Factsheet "Chronology of Events on September 11, 2001 released August 12, 2002; and CNN.Com, Special Report: America Remembers, available at www.cnn.com/SPECIALS/2002/america.remembers/sept11.section.html

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] Katia Hetter, "Labor Convention Addresses 9/11" Newsday.com (December 4, 2001).

[10] Tom Robbins, "Can Unions Seize the Post-9-11 Moment?" Village Voice (January 2, 2002).

workers to return to work as every large scale construction job in NYC had shut down.[11] Ultimately, the crews who staffed the monumental clean up of Ground Zero were union crews.

The unionized men and women displayed honor and valor during the September 11th rescue operation, clean-up operation, or both. These unionized brothers and sisters worked diligently on behalf of our national security. Being organized aided them in their ability to seek the necessary skills, know-how, equipment, and work-benefits that they utilized in their unprecedented efforts on behalf of our country. The Board honors their efforts by asserting jurisdiction over the privatized transportation security screeners who are *continuing* the work necessitated by September 11, 2001.

B. PERMITTING SCREENERS TO ORGANIZE IS IN THE PUBLIC INTEREST AND PROMOTES NATIONAL SECURITY.

Regulating management and labor disputes aids in minimizing such disputes, and therefore, is in the public interest; this is particularly true when the employees work on behalf of national security. Private sector employees working on behalf of national defense have had the right to collectively bargain throughout times of national emergency and strife. In fact, the Board has asserted jurisdiction over government contractors in the name of national defense. *Ready Mixed Concrete and Materials, Inc. and Local #669, Concrete Products and Material Yard Employees*, 122 NLRB 318, 320 (1958). Specifically, in *Ready Mixed Concrete and Materials*, the Board stated:

> It has [eliminated requirements for Board jurisdiction not required by statute]... because it believes that it has a special responsibility as a

[11] *Id.*

> Federal agency to reduce the number of labor disputes which might have an adverse effect on the Nation's defense effort.

Id. Additionally, the Board has repeatedly asserted jurisdiction over government contractors even when those contractors work on security and/or national security issues for government agencies. See *U.S. Corrections Corp. and International Union, United Plant Guard Workers Of America*, 304 NLRB 934, 937 at fn. 32 and accompanying text (1991)("the Union correctly notes that the Board has asserted jurisdiction over other employers where security concerns exist."); *Castle Instant Maintenance/Maid, Inc. and SEIU*, 256 NLRB 130, 131 (1981)("the volume of the Respondent's business with the Marines is sufficient to warrant the conclusion that the Respondent's operations have a sufficient impact on national defense so as to warrant the exercise of the Board's jurisdiction."); *McDonnell Douglas Corporation and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 240 NLRB 794 (1979)(Board asserted jurisdiction over matter regarding security guards employed to protect facility that manufactures defense materials whose production, in some cases, are classified for purposes of national security); *Hazelton Laboratories, Inc. and International Chemical Workers Union*, 136 NLRB 1609 (1962); *General Electric Co and International Union of Electrical, Radio and Machine Workers, et al..*, 89 NLRB 726, 736 (1950)(Board asserted jurisdiction over workers employed at nuclear energy plants regulated by the Atomic Energy Commission). Consistent with Board long standing precedent, the Board should assert jurisdiction in the name of national security.

The Employer argues that national security interests should prevail over the Petitioners' fundamental right to organize for the purposes of collective bargaining. It is incredulous to suggest, as Employer does, that collective action to secure safe, decent and healthy workplace conditions would conflict with transportation screeners' mandate to secure air travel for national security. Even in times of peril where national security was at risk, the Supreme Court has recognized "'the right to organize and select representatives for lawful purposes of collective bargaining . . . as a 'fundamental right'...." *International Union Auto. Workers v. Wisconsin Employment Relations Board*, 336 U.S. 245, 259 (1948).[12] *See also Thomas v. Collins*, 323 U.S. 516 (1945); *Hague v. C.I.O.*, 307 U.S. 496, (1939); *N.L.R.B. v. Jones and Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937)("Thus, in its present application, the statute goes no further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer. That is a fundamental right."); and *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209 (1921)(Labor unions are recognized ... as legal when instituted for mutual help and lawfully carrying out their legitimate objects. They have long been thus recognized by the courts. They were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer....Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought

[12] While the holding in this case regarding employees' right to strike as peaceable conduct was over-ruled by a later case, the proposition cited herein was not.

it was worth. The right to combine for such a lawful purpose has in many years not been denied by any court."). Prohibiting screeners from asserting their fundamental right to organize for the purpose of collective bargaining is not justified by any current public danger.

C. A NATIONAL SECURITY EXCEPTION IS UNWORKABLE AND UNREALISTIC.

The Board should reject the national security exception for it is unworkable and unrealistic. In *Management Training Corporation*, the Board rejected the *Res-Care* standard as "unworkable and unrealistic." *Management Training Corporation, supra,* at 1355 ("we believe that the test set forth in *Res-Care* is unworkable and unrealistic."). The Board continued to explain that the "problem with the existing *Res-Care* standard is that it invites litigation and unnecessarily wastes the Board's resources." *Management Training Corporation, supra,* at 1359. The same reasoning applies to the instant case. The creation of a national security exception will open the flood gates to litigation which will unnecessarily waste the Board's resources. Moreover, the creation of a national security exception has the potential to eviscerate the general application of the NLRA to government contractors. This, as argued above, will ultimately hurt national defense. Therefore, the Board should assert jurisdiction in the instant case in the name of national security.

D. THE BOARD SHOULD ASSERT JURISDICTION SO AS TO PREVENT THE TYPE OF ABUSES OCCURRING AMONGST THE FEDERAL TRANSPORTATION SECURITY SCREENERS.

The Board should assert jurisdiction over private sector security screeners in order to prevent the type of workplace abuses that occur with respect to the federal security screeners who have been stripped of their right to organize for the purposes of collective bargaining. *Department of Homeland Security and AFGE*, 59 F.L.R.A. 423 (2003). Numerous government reports and newspaper articles decry workplace problems within the Transportation Security Administration that could be resolved through regulated employee organizing and collective bargaining. For example, the Occupational Safety and Health Administration (OSHA) has reported that federal transportation security screeners have the highest rate of on-the-job injury in comparison to any other group of employees in the entire federal government, and the number/percentage has increased every year.[13] Similarly, the Office of the Inspector General (OIG) of the Department of Homeland Security revealed serious flaws in TSA training of its security screeners in a September 2004 report. While noting some improvements, the OIG found that, "neither passenger nor checked baggage screeners received instruction, practice, or testing for some skills necessary to their functions, such as safety skills to handle deadly or dangerous weapons and objects."[14] The Government Accounting Office found six of the largest airports reported frequently having to require mandatory overtime to successfully

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[13] See OSHA's Federal Injury and Illness Statistics for Fiscal Year 2003 at http://www.osha.gov/dep/fap/statistics/fedprgms_stats03.html; and OSHA's Federal Injury and Illness Statistics for Fiscal Year 2004 at http://www.osha.gov/dep/fap/statistics/fedprgms_stats04_final.html.

[14] Department of Homeland Security, Office of Inspector General, "The Evaluation of the Transportation Security Administration's Screener Training and Methods of Testing," Office of Inspections, Evaluations, & Special Reviews, OIG-04-045, September 2004, p. 6.

conduct passenger and baggage screening, especially during holidays and the summer travel season. Between May 2003 and January 2004, TSA used the equivalent of an annualized average of 2,315 full-time screeners in overtime hours per pay period.[15] Mandatory overtime causes numerous problems for screeners: for example, increased exhaustion (which leads to injury), difficulty in meeting child-care obligations, or both. The abuse of the federalized security screeners has led to one of the highest rates of attrition in the federal government.[16] A collective bargaining agreement that provided for sufficient training, safety measures, fair overtime rotations, and other terms or conditions of employment may have reduced the high levels of injury and attrition, thereby assuring employees dedicated to national security.

Federal screeners endure workplace abuses on a daily basis. AFGE contends that the lack of federal screener workplace safeguards is a direct result of the FLRA's failure to assert jurisdiction and hold an election for federal screeners wishing to organize for the purpose of collective bargaining. These daily abuses could be easily remedied with the right to collectively bargain. Applying this knowledge to the instant case, the Board should not allow private employees to be lost to workplace abuses in the same manner that federal employees have been violated. Were the Board to decline jurisdiction, private screeners will be unprotected in the same manner as the federal screeners. The Board is urged to exercise jurisdiction on behalf of the private sector security screeners so that private sector security screeners will not be unprotected.

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[15] U.S. General Accounting Office (GAO), "Aviation Security: Challenges Exist in Stabilizing and Enhancing Passenger and Baggage Screening Operations," Testimony before the Subcommittee on Aviation, House Committee on Transportation and Infrastructure, Statement of Cathleen A. Berrick, director, Homeland Security and Justice, February 12, 2004, p. 8.

[16] In 2004, airport screener turnover averaged 20 percent. *Airports*, vol. 21, no. 34, August 31, 2004.

CONCLUSION

For the foregoing reasons, the Board has the statutory right to assert jurisdiction over private security screeners and should assert such jurisdiction in the name of national security.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief of Amicus Curiae American Federation of Government Employees, AFL-CIO In Support of Petitioner were served this 3rd day of August, 2005 by first-class mail, postage-prepaid upon the following parties:

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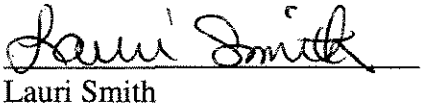

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